United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

No. 76-6111

76-6111

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SAMUEL D. MAGAVERN, As Executor and Trustee of The Last Will and Testament of MARGARET C. DUNCAN, Deceased,

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee

REPLY BRIEF

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PREFACE

In reply to the Brief of the United States the Trustee of the Estate of Margaret C. Duncan respectfully points out that the sole question to be decided herein remains the same, to wit: Does Article Third (1) of the decedent's Will create in Thomas W. Doran "a right to property" that can be reached by a creditor, in this case the United States Government. There is and has been no question as to validity of any statute of the United States Government--simply a construction of Article Third of the decedent's Will.

The Surrogate of Erie County on a Show Cause Order addressed to the United States Government (who had served a levy on the Trustee claiming that the Trustee of the decedent, Margaret C. Duncan, held a right to property belonging to the debtor), decided that the Trustee held no "right to property" of Thomas W. Doran, debtor of the Government, to wit:

> "There is no property or rights to property belonging to the beneficiaries, specifically Thomas W. Doran, the subject of the levy." In Re Will of Duncan, 362 NYS2d 788, 792.

Two paramount issues are raised:

I. Is the Surrogate's decision binding on the United States Government?

As to this question, the District Court attempts to escape the recognized law set forth in Aquilino v. United States, 363 U.S. 509 (1960), which states:

> "In answering the question of property or rights to property to which a tax lien can attach both Federal and State courts must look to State law."

by quoting from Commissioner v. Bosch, 387 U.S. 456 (1967).

II. Was the Surrogate of Erie County in error on his decision "that the debtor had no property or property rights in the hands of the Trustee but only an expectancy"?

If the Appellant is right on either of these issues then it follows that the decision of the District Court must be reversed and an affirmative judgment granted discharging the levy.

POINT I

THE UNITED STATES WAS PROPERLY CITED IN THE APPLICATION FOR A CONSTRUCTION OF THE WILL OF MARGARET C. DUNCAN TO SURROGATE OF ERIE COUNTY.

As a party who would be affected by the decision of the construction it was proper procedure and required under the law laid down in the Commissioner v. Bosch, (supra) (discussed more fully in Point II) to give notice of the petition of the construction proceeding so it could protect its rights. In Matter of Rosenberg's Estate, 269 NY 247, cited by the United States, the United States intervened as a creditor under similar circumstances.

The United States, being bound by New York law on property rights, had the choice of: defaulting; or appearing

specially and contesting jurisdiction; or arguing the merits of the matter.

The United States appeared and was informed by the Surrogate Court it had no jurisdiction over the levy but did over the construction of the rights of the debtor as they pertained to his interest in the Margaret C. Duncan Estate and he would maintain that jurisdiction. In Re Will of Duncan, 362 NYS2d at p. 790. The United States did not appeal the decision which held the Trustee had no rights to property of Thomas W. Doran, the debtor. (See SCPA §1420(4), set forth in Appellant's Brief at p. 13.)

Concurrent with the construction proceeding the Trustee started this action in the United States Court to discharge the levy; the Trustee acknowledging thereby that the United States District Court had exclusive jurisdiction over the validity of the levy. This case was held in abeyance until the Surrogate rendered his decision. Upon the construction by the Surrogate that the debtor, Thomas W. Doran, had no property rights the Trustee moved for a summary judgment to discharge the levy.

To urge, as the Government does in its Brief, that the Surrogate agrees this was not an adversary proceeding affecting the United States' right is incredible when the Surrogate decreed "there is no property or rights to property belonging to the beneficiaries, specifically to Thomas W. Doran, the subject of the levy." (Emphasis added) In Re Will of Duncan, 362 NYS2d at p. 792.

It was up to all claimants who received proper notice to choose at their peril between pressing their claims or permitting the matter to default.

Further, the judgment was a "judgment in rem" which cannot be collaterally attacked by this court. United States of America v. Bleasby, 257 F2d 278. The United States choose to default.

The fact that the creditor is the United States makes no difference as its rights are no greater than the rights of the debtor. The Surrogate held that:

> "[t]he creditor, in this case the United States Government, cannot compel the trustee to make a payment pursuant to the terms of the trust where the beneficiary, individually, could not compel the trustee to make such a payment." In Re Will of Duncan, 362 NYS2d at p. 791.

POINT II

THE DECISION OF COMMISSIONER VS. BOSCH, (SUPRA) DOES NOT APPLY.

The heart of the Bosch (supra) decision is based on the infliction on the Federal taxing authorities a lower State court ruling in a matter in which the United States had an interest and (1) that involved interpretation of Federal law, (2) it had no opportunity of being heard (an ex parte ruling), (3) and on which the highest court of the State had not spoken.

The Trustee submits that the Bosch (supra) case does not apply on any one of the foregoing three grounds and was therefore applied in error.

1. The sole question being a construction of a Will--there are no Federal laws or statutes involved only the question of does the debtor have a right to property claimed by a creditor, in this case the United States Government, which is a common law question.

2. That the decision of the Surrogate was not "Ex Parte". At no time did the Surrogate say he would treat the construction of the Will of Margaret C. Duncan as "Ex Parte" as stated by the United States in its Brief on page 4 thereof.

Black's Law Dictionary defines an EX PARTE PROCEEDING as:

> "A proceeding at the instance and for the benefit of one party only and without notice or opportunity to oppose to any party adversely affected; such a proceeding necessarily presupposes that there is no adverse party." Black's Law Dictionary, Revised Fourth Edition (1968); 1 C.J.S. Actions, §1, p.957; 2A New York Civil Practice (Weinstein-Korn-Miller). ¶2211.04; New York CPLR §221 (Practice Commentary C2211:5).

By contrast an ADVERSARY PROCEEDING is:

> "A proceeding in which the party seeking relief has given legal warning to the other party, and afforded the latter an opportunity to contest it." Black's Law Dictionary (supra) at p. 73. "A proceeding is not ex parte where an adversary party is given notice and an opportunity to be heard, but chooses not to appear to oppose." Black's Law Dictionary, (supra) p. 662.

The Government was given due and proper notice of the Surrogate's proceeding by service of a show cause order on June 28, 1974, and it appeared in the Surrogate's Court and filed an affidavit therewith on July 24, 1974, and it further appeared and filed a memorandum of law with the Surrogate's Court on September 25, 1974 (App. 29-30). In addition, the Surrogate Court's decision (App. 24) and Order (App. 21) clearly refutes the Government's contention and the District Court's determination that such proceeding was ex parte.

3. The United States' Brief herein relies on the conclusion that the highest court of the State has not passed on this question but then proceeds to quote and base its argument on the law established in Hamilton v. Drogo, 241 NY 401 (1926) and Sand v. Beach, 270 NY 281 (1936). The Government in its Brief also adds and relies on In Re Rosenberg Will, 269 NY 247. The latter two cases clearly set forth that the Trustee did not have discretion to pay to any one other than the debtor beneficiary or more correctly the Trustee was bound to apply or to pay over all of the trust income and/or principal to the debtor and there was no alternative party or parties that could receive any of the benefits to the exclusion of the debtor. In contrast, in Hamilton v. Drogo (supra), the Trustee, as in this case, had absolute discretion to pay to others than the debtor and therefore the Trustee had no "rights to property" belonging to the debtor which the creditor could reach. This case expresses precisely the law to be applied herein.

It might be noted that if any of the three pre-requisites are missing it is not a valid authority.

One further comment appears in order. It certainly was not the Court's intention in Bosch (supra) to make it possible for the Federal Government to appear in a proceeding, contest the jurisdiction, and then default thus leaving a successful party no right to appeal to the highest court of the State, thereby automatically making it necessary to have the trial repeated in a Federal court because lack of ruling by the State's highest court.

POINT III

THE COURT HEREIN ERRED IN HOLDING THAT THE TRUSTEE UNDER NEW YORK LAW HELD RIGHTS TO PROPERTY OF THOMAS W. DORAN, DEBTOR, AND NOT SIMPLY A RIGHT OF EXPECTANCY.

In determining the rights of the creditor we must determine the rights of the debtor, Thomas W. Doran, as a beneficiary of the Margaret C. Duncan Trust. For convenience we repeat the relevant provision.

> "1. This Trust shall be held and administered for the benefit of the family group consisting of those from time to time living of my husband, MATTHEW DUNCAN, my son, THOMAS W. DORAN, his children and the issue of his children. My Trustee shall pay over or use, apply and expend whatever part of all of the new income or principal (even to the point of exhaustion thereof), or both, thereof he shall deem proper or necessary in order to provide comfortable support, maintenance and/or education (at

any level) to the individual member of the said family group. My Trustee shall not feel bound, in making such payments, uses, applications or expenditures, to observe any rule or precept of equality as between the individual members of said family group. (Emphasis added).

It is to be noted by the first sentence that specific individuals and several classes of the family group are named solely to denote those eligible to receive benefits and these include various family group levels, husband, son, grandchildren and great grandchildren. By the second sentence the Trustee is authorized to spend or apply and expend whatever part or all of net income or principal even to the point of exhaustion to provide comfortable support or maintenance and/or education to the individual or classes named. The last sentence provides that the Trustee shall not be bound in making expenditures to observe any rule or precept of equality as between individual members of said family group.

Therefore, for example, he could completely exhaust the fund in education without reserving funds for the husband or son or any member or members of a class that was in the process of being educated.

The Government in its Brief, as did the Courts, both Surrogate's and District, rely on the case of Hamilton v. Drogo (supra) decided by the Highest Court of New York, which is directly in point. The District Court makes an attempt to distinguish the law from the instant case by the fact that this

draftor of the Will, after defining the group as the son, his wife or children or other issue, used the words "one or more exclusively of the other or others", p. 403, rather than the words used by the draftor in the instant case, "in making expenditures the Trustee shall not 'be bound to observe any rule or precept of equality'."

It is hard to believe that the court means that husband, son, all grandchildren and all great grandchildren in being would be entitled to a nominal consideration of $1.00 each or an amount fixed by trial as required by Judge Curtin's decision and thereby create a property interest that would subject the assets of the Trust to a creditor's levy in the amount to be determined by the trial.

The District Court goes on its opinion that "our situation is more similar to Beach (supra) than Drogo (supra)". Sand v. Beach, 270 NY 281 (1936). The Trustee agrees with Justice Lehman who in Sand v. Beach (supra) states at page 285:

> "If the discretion of the trustee were wide enough to permit the trustee to pay to or apply the income of the trust fund to the use or benefit of some person other than the judgment debtor, then to the extent of such payment or application the income of the trust fund would, in no sense, be due or owing to the judgment debtor. The income would have no interest in it. So we decided in the case of Hamilton v. Drogo, supra."
>
> "Thus choice of the person for whose benefit the income of the

> fund should be applied rested solely with the trustee, and if the trustee choose to apply the income exclusively for the benefit of the wife or any one of the children (or in our case a class of children) of the judgment debtor, the judgment debtor would have no right to such income any more than if the trust had been originally established for the exclusive benefit of such wife or child."

It is submitted the English language can express a given result in many ways which all arrive at the same result (six, one-half dozen, 5 + 1). The intent of the decedent is the cardinale principle in construing a will. No cases need to be cited to justify this universally accepted principle of construction. It is clear that the intent of Margaret C. Duncan was to give the Trustee full right to use or apply assets of the Trust as in his sole discretion deemed for the comfortable support, maintenance and/or education of any individual or member of a class of the defined family group. The law has no patience with nominal or technical decisions. Further, both equality and inequality are measured from zero not from an amount superimposed by a court.

There is no need to discuss the cases cited involving the failure of the trustee to honestly and faithfully exercise the discretion vested in him. This can only be a gratuity as in the instant case, the Trustee, upon the Government making a claim by filing a lien, forthwith sought the construction and decision of the Surrogate's Court and brought an action to discharge the lien in Federal Court. So these cited cases are irrelevant to the issues to be determined herein.

SUMMARY

A. The United States was properly cited by and appeared, specially in Surrogate's Court of Erie County, New York. It elected to argue jurisdiction of court, claiming as a levy was involved, the court had no jurisdiction. The court clearly took the position it had and retained jurisdiction only over the construction of the Will of the decedent, Margaret C. Duncan. The United States elected not to argue the construction on the merits although it claimed the Trustee held "rights to property" of its debtor, Thomas W. Doran, as a beneficiary. The United States did not appeal from the decision of the Surrogate, holding to the contrary. Therefore, the United States failed to take action at its peril. United States of America v. Bleasby, 257 F2d 278 (C.A. 3, 1958); SCPA §1420(4).

Further, the judgment being a judgment in rem, it cannot be collaterally attacked in this action. United States v. Bleasby (supra).

B. The District Court and the United States in an effort to escape the law cited in Aquilino v. United States, 363 U.S. 509 (1960) and agreed on by both parties, to wit: "In matters of property rights, the law of the State prevails", cite Commissioner v. Bosch (supra). The Bosch case is not relevant for the following reasons:

1. The United States was given notice and opportunity to oppose therein. It was not an ex parte proceeding.

2. No Federal statutes were involved. The Surrogate made this choice.

3. The highest Court in New York State had passed on the rights of a beneficiary to property in similar situations, which is the sole critical issue in this case. Hamilton v. Drogo (supra) and Sands v. Beach (supra).

Thus, the United States is bound by the decision of the Surrogate as was held in United States v. Bleasby (supra).

C. Finally, the District Court misinterpreted the law of the State of New York, correctly pronounced by the Surrogate, by failing to distinguish between a vested interest in a beneficiary ormere right of expectancy. Hamilton v. Drogo, (supra) and Sand v. Beach (supra).

The finding in the affirmative for one of the above three points entitles the Trustee to a reversal of the District Court and an affirmative judgment discharging the lien.

Respectfully submitted,

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CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on opposing counsel by mailing two copies thereof on this 22nd day of October, 1976, in an envelope, with postage prepaid, properly addressed to them as follows:

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